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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session, 20–24 August 2018

Opinion No. 50/2018 concerning Edris Cheraghi (Australia)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 11 May 2018 the Working Group transmitted to the Government of Australia a communication concerning Edris Cheraghi. The Government replied to the communication on 10 July 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,

* In accordance with para. 5 of the Working Group's methods of work, Leigh Toomey did not participate in the discussion of the present case.

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disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Edris Cheraghi, born in 1987, is of Iranian origin. He usually resides at the Villawood immigration detention centre, Australia.

Arrest and detention

5. According to the source, Mr. Cheraghi arrived at Christmas Island, Australia, on a boat on 13 December 2012 to seek asylum from persecuting forces in Iran. He reportedly sought recognition of his refugee status because:

(a) Mr. Cheraghi is from the Arab Kamari ethnic group, which is a subtribe of the Bakhtiari tribe. In 2011, the Government of the Islamic Republic of Iran reportedly confiscated (without compensation or permission) Mr. Cheraghi's family land in order to build the Gotvand Dam in Khuzestan. The confiscation of the land left Mr. Cheraghi's family without sufficient means to subsist. The confiscation of land without compensation or permission is allegedly also reflective of the treatment of Arabs in Iran;

(b) In approximately August 2014, while living in Australia, Mr. Cheraghi converted from Islam to Christianity. He would thus be viewed as an apostate in Iran;

(c) Mr. Cheraghi reportedly had a relationship with a divorced woman, whose ex-husband was well connected with the Government of the Islamic Republic of Iran. In 2012, she ended the relationship and Mr. Cheraghi was subsequently targeted by various groups for threats and assaults.

6. Mr. Cheraghi was detained upon arrival at Christmas Island by officials from the Department of Immigration and Border Protection. The source reports that all those arriving by boat are provided with a type of warrant issued by the Department, but no documents are currently available.

7. The source reports that Mr. Cheraghi was subsequently transferred to the Darwin immigration detention centre, where he spent approximately three weeks before being moved to Wickham Point detention centre in the Northern Territory for approximately two months. Sometime around May 2013, Mr. Cheraghi was reportedly released into the community on a series of bridging visas E.

8. Around July 2015, Mr. Cheraghi was charged with an offence and arrested, and on 11 September 2015 his bridging visa was cancelled by the Department of Immigration and Border Protection and he was transferred to the Villawood immigration detention centre.

9. The source states that Mr. Cheraghi is being detained on the basis of the Australian Migration Act 1958. The Act specifically provides in sections 189 (1), 196 (1) and 196 (3) that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. In addition, section 196 (3) specifically provides that even a court cannot release an unlawful non-citizen from detention unless the person has been granted a visa.

10. Around October 2015, Mr. Cheraghi was placed by the Department of Immigration and Border Protection in administrative detention. He was subsequently transferred between Christmas Island and Villawood immigration detention centre a couple of times before being transferred back to Villawood in about February 2016, where he remains today.

11. The source notes that while Mr. Cheraghi has been charged with (a) breaking and entering, (b) assault occasioning actual bodily harm and (c) stealing, he has not been convicted of any offence.

12. The court dates for Mr. Cheraghi's offences have been rescheduled several times. The source reports that at a trial held in mid-December 2017, the jury was unable to reach

(even by majority) a verdict and the court date for a retrial was subsequently set for 13 August 2018. The source points out that by that time, Mr. Cheraghi would have been held in administrative detention for almost three years while waiting for the criminal justice process.

13. According to the source, that means, in effect, that the Department of Immigration and Border Protection has prejudged Mr. Cheraghi's guilt and determined that merely a criminal charge, without conviction, is sufficient to determine that a person is guilty and, as such, to cancel a person's visa and administratively detain that person. The source also notes that the subject matter of the offence is immaterial — what is material is the prejudgment of guilt resulting in detention. Furthermore, the source emphasizes that the behaviour of the Department in doing so represents a worrying intrusion into the separation of powers on which the Australian political system is based.

14. The source also notes that Mr. Cheraghi has a history of mental illness or psychosocial disability. He has been diagnosed with various conditions, including borderline personality disorder, bipolarity, depression and anxiety. He has a history of self-harm (both in the Islamic Republic of Iran and Australia) and he continues to be assessed as being at high risk of self-harm. The source notes that the continuing detention of Mr. Cheraghi is having a negative impact on his mental health. In that regard, the source notes that the counsellors provided by the Government of Australia have recommended that he be released into the community to better manage his mental health. Given that Mr. Cheraghi had reported hearing voices and a high level of anxiety, the counsellors also recently recommended an assessment by a psychiatrist and regular observation by a counsellor while he is detained owing to his past suicide attempts and history.

15. According to the source, Mr. Cheraghi has exhausted all domestic remedies to secure his release. Following his arrival in Australia on 13 December 2012, the Department of Immigration and Border Protection conducted an irregular maritime arrival entry interview on 17 January 2013 as part of his protection obligation application process. He was subsequently granted legal assistance to complete a protection visa application on or about 24 February 2016. On 27 June 2016, he lodged a safe haven enterprise (subclass 790) visa application which was refused by the Department on 10 October 2016. On 14 October 2016, the refusal of the Department was referred to the Immigration Assessment Authority for its review of the merits; on 17 January, it upheld the decision of the Department.

Submissions under category II

16. The source submits that Mr. Cheraghi has been deprived of his liberty as a result of the exercise of his rights guaranteed by article 14 of the Universal Declaration of Human Rights, whereby "Everyone has the right to seek and to enjoy in other countries asylum from persecution". The source thus submits that the detention of Mr. Cheraghi constitutes an arbitrary deprivation of his liberty, falling within category II.

Submissions under category IV

17. The source further submits that Mr. Cheraghi, as an asylum seeker, who is subject to prolonged administrative custody, has not been guaranteed the possibility of administrative or judicial review or remedy.

18. As referred to in paragraph 9 above, the Australian Migration Act 1958 specifically provides in sections 189 (1), 196 (1) and 196 (3) that unlawful non-citizens must be detained and kept in detention until they are either removed or deported from Australia (which in Mr. Cheraghi's case would very likely constitute refoulement (including constructive refoulement)), or granted a visa. In that respect, the source notes that Mr. Cheraghi has not been recognized as being owed protection obligations by Australia. Furthermore, given that he currently faces criminal charges, it is extremely unlikely that the Government would grant him either a bridging visa or community detention placement to enable him to reside in the community. The source further recalls that section 196 (3) specifically provides that even a court cannot release an unlawful non-citizen from detention (unless the person has been granted a visa).

19. In that respect, the source notes that the High Court of Australia, in its decision on the case of *Al-Kateb v. Godwin* (2004) 219 CLR 562, has upheld mandatory detention of non-citizens as a practice which is not contrary to the Constitution of Australia. The source further notes that the Human Rights Committee in *C. v. Australia* (CCPR/C/76/D/900/1999) held that there is no effective remedy for people subject to mandatory detention in Australia. As such, while Mr. Cheraghi has progressed with the protection visa process, the Department of Immigration and Border Protection has had approximately five and a half years in which to determine his protection claim. The Immigration Assessment Authority most recently reviewed the decision by the Department Mr. Cheraghi's protection visa application and upheld that decision.

20. In addition, Mr. Cheraghi has sought legal advice as to the merits of any judicial review of the decision of the Immigration Assessment Authority. The advice that Mr. Cheraghi has received is that there is no judicial (as opposed to the merits, which a court cannot review) error in the decision of the Authority and there are thus no prospects of success for a judicial review of that decision. The source notes that such processes relate to Mr. Cheraghi's protection visa process and not directly to his detention. However, the source also notes that a positive protection process assessment without character concerns would result in the release of Mr. Cheraghi from detention.

21. The source also states that if Mr. Cheraghi was found to be owed protection obligations by Australia, because of the criminal charge against him, it is extremely unlikely that he would meet the Department's character requirements for the granting of a visa.

22. On the basis of the above, the source notes that Mr. Cheraghi lacks any chance of his detention being the subject of a real administrative or judicial review or remedy. His detention thus constitutes an arbitrary deprivation of liberty, falling within category IV.

Submissions under category V

23. According to the source, Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The effective result of the decision of the High Court in the case of *Al-Kateb v. Godwin*, as referred to in paragraph 19 above, is that while Australian citizens can challenge administrative detention, non-citizens cannot. The detention of Mr. Cheraghi thus constitutes an arbitrary deprivation of his liberty, falling within category V.

Response from the Government

24. On 11 May 2018, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 10 July 2018, detailed information about the current situation of Mr. Cheraghi and any comments on the source's allegations.

25. In its reply of 10 July 2018, the Government of Australia reiterates its long-standing commitment to cooperating with the United Nations and its strong human rights record. The Government remains committed to an effective and robust international protection programme, recognizing the dual humanitarian imperative to both afford protection where it is engaged and to protect people from abuse and exploitation. The Government also reiterates that it takes its protection obligations very seriously, and its protection arrangements are premised on the fundamental obligation of non-refoulement.

26. The Government then outlines its legal and policy framework in relation to immigration detention. The Government considers that mandatory immigration detention of unlawful non-citizens is an essential component of strong border control. According to the legislative framework, the length of immigration detention is not limited by a set time frame but is dependent upon a number of factors, including identity determination, developments in country information and the complexity of processing according to individual circumstances relating to health, character or security matters. Relevant assessments are completed as expeditiously as possible to facilitate the shortest possible time frame for detaining people in immigration detention facilities.

27. It is the position of the Government that the immigration detention of an individual on the basis that he or she is an unlawful non-citizen is not arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. Being held in detention is a last resort for the management of unlawful non-citizens. The Government adds that its case management practices ensure that any person who is detained understands the reason for their detention and the choices and pathways which may be available to them, including choosing to return to their country of origin or deciding whether to pursue legal remedies. The Government also notes that the immigration detention system is subject to regular scrutiny, including visits by external agencies, to ensure that people in immigration detention are treated humanely, decently and fairly.

28. Against that background, the Government explains that Mr. Cheraghi arrived at Christmas Island, an excised offshore place, on 16 December 2012, as an illegal maritime arrival. At the time of his arrival, he was reasonably suspected to be an unlawful non-citizen and did not hold a visa to enter Australia. As a consequence, he was detained under section 189 (3) of the Migration Act 1958, which provides that if an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer must detain the person.

29. On 22 March 2013, Mr. Cheraghi was transferred to the Northern immigration detention centre and detained under section 189 (1) of the Act.

30. The Government states that on 22 May 2013, the former Minister for Home Affairs intervened under section 195A of the Migration Act, to grant Mr. Cheraghi a temporary humanitarian stay (subclass 449) visa for seven days and a bridging visa E (subclass 050) for six months. Mr. Cheraghi was released from immigration detention the same day.

31. The bridging visa E ran out on 22 November 2013. On 9 October 2014, the Minister intervened under sections 91L (1) and 46A (2) of the Migration Act to enable the Department to grant Mr. Cheraghi a bridging visa E. On 31 October 2014, Mr. Cheraghi was granted a bridging visa E and on 15 August 2015, he was granted a farther one.

32. According to the Government, on 26 August 2015, Mr. Cheraghi was remanded in criminal custody on a number of criminal charges, including aggravated breaking and entering with intent to inflict actual bodily harm and stealing property in a dwelling house.

33. On 11 September 2015, the delegate of the Minister cancelled Mr. Cheraghi's bridging visa E under section 116 (1) (g) of the Migration Act, pursuant to regulation 2.43 (p) (ii) of the Migration Regulation 1994 and on 18 September 2015, Mr. Cheraghi lodged an application with the Administrative Appeals Tribunal for review of the cancellation of his visa (WE050).

34. The Government also states that on 30 October 2015, Mr. Cheraghi was detained under section 189 (1) of the Migration Act upon release from the John Morony correctional centre and was transferred to Villawood immigration detention centre.

35. On 19 November 2015, the Administrative Appeals Tribunal confirmed the decision to cancel Mr. Cheraghi's bridging visa E.

36. On 1 December 2015, the Minister intervened to lift the bar under section 46A (2) of the Migration Act to allow Mr. Cheraghi to apply for a temporary protection (subclass 785) visa or a safe haven enterprise visa.

37. According to the Government, on 6 June 2016 Mr. Cheraghi was issued with a criminal justice stay certificate by the New South Wales Department of Public Prosecutions in respect of the criminal charges laid against him on 26 August 2015. On 28 June 2016, the delegate of the Minister refused to grant Mr. Cheraghi a criminal justice (subclass 951) visa. On the same day, Mr. Cheraghi applied for a safe haven enterprise visa.

38. On 4 July 2016, he was interviewed by the Department in respect of his application. On 29 July 2016, the bridging visa E application associated with the safe haven enterprise visa application was found to be invalid. The delegate subsequently refused to grant Mr. Cheraghi a safe haven enterprise visa on 10 October 2016.

39. On 17 January 2017, the Immigration Assessment Authority confirmed the delegate's decision. On 8 February 2017, Mr. Cheraghi lodged an appeal against the decision of the Immigration Assessment Authority at the Federal Circuit Court. On 22 May 2017, he decided not to pursue this application and filed a notice of discontinuance.

40. On 16 January 2018, Mr. Cheraghi applied for a bridging visa E but the application was deemed invalid on 18 January 2018.

41. According to the Government, the criminal charges laid against Mr. Cheraghi on 26 August 2015 are still in force. He was scheduled to appear before the Parramatta District Court for mention on 26 July 2018 and his trial was scheduled to commence on 14 August 2018.

42. On 20 June 2018, Mr. Cheraghi's case was referred for assessment by the Department of Home Affairs against the ministerial intervention guidelines, for a possible referral to the Minister for consideration of the grant of a visa or residence determination under sections 195A and 197AB of the Migration Act. Mr. Cheraghi's case continues to be assessed.

43. The Government rejects the claims by the source that the removal or deportation of Mr. Cheraghi would constitute refoulement. He is an unlawful non-citizen, detained under section 189 of the Migration Act and is required under section 196 of the Act to be detained under section 198 or 199 of the Act, or granted a visa. As noted above, Mr. Cheraghi applied for a safe haven enterprise visa and this was refused. His case was thus assessed against the country's protection obligations and it was found that Australia did not owe him protection.

44. The Government also rejects claims made by the source that Mr. Cheraghi has not been guaranteed the possibility of administrative or judicial review or remedy of his ongoing detention. According to the Government, a person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court of Australia. Section 75 (v) of the Constitution provides that the High Court of Australia has original jurisdiction in relation to every matter where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth.

45. The Government rejects further claims by the source that, as a result of the decision of the High Court in the case of *Al-Kateb v. Godwin* non-citizens are not equal before the courts. The High Court held that the provisions of the Migration Act requiring the detention of non-citizens until they are removed, deported or granted a visa, even if removal is not reasonably practicable in the foreseeable future, were valid.

46. The Government explains that Mr. Cheraghi's detention has been reviewed on numerous occasions under case management processes in meetings of the Case Management and Detention Review Committee. The outcomes of those reviews have found that Mr. Cheraghi's detention continues to be appropriate.

47. The Government adds that Mr. Cheraghi remains in immigration detention in Australia as he is an unlawful non-citizen with outstanding criminal matters. A number of detention review mechanisms allow for a regular review of the merits of his ongoing detention. They include detention review committees, which are held monthly to review all cases in those being held in detention, to ensure the ongoing lawfulness and reasonableness of the decision to detain a person, by taking into account all the circumstances of the case, including adherence to legal obligations. In addition, part of the ongoing review of individuals in immigration detention includes a risk-based approach to the consideration of the appropriate placement and management of an individual while their status is being resolved. In accordance with section 486N of the Migration Act, the Secretary of the Department of Home Affairs provides the Commonwealth Ombudsman with a report relating to the circumstances of a person's detention for every person who has been in immigration detention for more than two years and every six months thereafter.

48. The Government concludes by noting that people in immigration detention have access to clinically recommended physical and mental health-care services of a standard generally commensurate with the health care available to the Australian community, taking

into account the diverse and potentially complex health needs and cultural sensitivity of people in immigration detention.

Further information from the source

49. On 10 July 2018 the Working Group transmitted the reply from the Government to the source for any further comments.

50. In its response of 24 July 2018, the source notes that the Government response overall appears to assert that because open-ended detention (subject to certain events, discussed below) is lawful in Australia, that it is either not arbitrary or otherwise complies with the country's international obligations. According to the Government, Mr. Cheraghi, as an unlawful non-citizen, is lawfully detained under Australian law. The source, however, argues that such lawful detention is arbitrary and open-ended (or worse, indefinite).

51. The source reiterates that under the Migration Act 1958, an unlawful non-citizen must be detained, and kept in immigration detention until they are removed from Australia or granted a visa. In addition, section 196 (3) of the Act provides that: "To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1) (a), (aa) or (b)) unless the non-citizen has been granted a visa." As such, providing there is some sort of process relating to the grant of a visa or removal (even if removal is not reasonably practicable in the foreseeable future), the detention of an unlawful non-citizen is permitted under Australian law.

52. The source adds that the detention of Mr. Cheraghi has a further element, which is that he has been issued with a criminal justice stay certificate that prevents his removal while his criminal matter is ongoing. That means that he is detained, despite the Government making no current attempts to remove him or to grant him a visa. The source adds that Mr. Cheraghi remains in detention, despite pleading not guilty, and a jury being unable to render a verdict. As such, he faces a second trial. In that respect, the source submits that the length of time Mr. Cheraghi has waited for an outcome on his criminal matters exceeds the maximum custodial sentence that could be imposed if he is found guilty.

53. According to the Government response, persons can make a request to the Minister of Home Affairs to exercise his personal, discretionary and non-compellable powers under the Migration Act to intervene in their case. The source adds that they are also not reviewable. As such, Mr. Cheraghi can reportedly not pursue this option as a legitimate path to end his detention. In addition, even if an unlawful non-citizen does make submissions to the Minister to exercise those powers, the submission must pass through a series of guideline checks to determine if the submission should be referred to the Minister. Mr. Cheraghi was referred under this power on 20 June 2018. That followed a diagnosis of deep vein thrombosis and pulmonary embolism, following hospitalization after he had coughed blood for several days. In addition, since 20 June 2018, Mr. Cheraghi has reportedly been assaulted twice in detention and has two broken hands, both of which required surgery. He also suffered a head injury, which required staples. Despite repeated requests to the Department of Home Affairs for Mr. Cheraghi to be urgently assessed against the guidelines for referral to the Minister, the source is not aware that any progress has been made.

54. The source refers to the Government response, where it notes its commitment to ensuring that all individuals in administrative immigration detention are treated in a manner consistent with the country's international legal obligations. In that respect, the source submits that it is not the treatment of people in detention that is the subject of its current complaint. It is the actual fact of detention itself. The source adds that despite five opinions issued in 2017 and 2018, where the Working Group found that the subjects of those opinions were held in arbitrary detention, none of those individuals have been released.

55. In its response, the Government notes various situations in which detention may not be arbitrary and where a person can challenge their detention, through actions such as habeas corpus. However, the source submits that these situations do not apply to Mr. Cheraghi. The source adds that the discussion of such situations generates an impression

that options may be available to Mr. Cheraghi. That is not correct, as his detention is lawful under Australian law, whereas a habeas corpus action relates to unlawful detention.

56. In relation to the statement by the Government that the length of detention is not limited by a set time frame but is dependent upon a number of factors, including identity determination, developments in country information and the complexity of processing according to individual circumstances relating to health, character or security matters, the source submits that Mr. Cheraghi's identity is not in question, nor have any health or security matters been raised by the Department. The source adds that Mr. Cheraghi is in detention because the Department has determined that he does not meet the character requirements under section 501 of the Migration Act. That is despite Mr. Cheraghi pleading not guilty to the criminal charges he is accused of and a jury being unable to render a verdict.

57. The Government further states in its response that relevant assessments are completed as expeditiously as possible to ensure that people are detained in immigration detention facilities for the shortest possible time. According to the source, that is not correct, as people in detention centres can wait for more than five years for a primary assessment to be completed (including character considerations).

58. According to the Government response, being held in detention is a last resort for the management of unlawful non-citizens. The source notes that this is not correct, as it is the first resort for unlawful non-citizens. Under section 189 of the Migration Act, unlawful non-citizens must be detained.

59. The source reiterates that the case of *Al-Kateb v. Godwin* reinforces the position of Mr. Cheraghi, given that his arbitrary open-ended detention is authorized by Australian law (in terms of both legislation and case law). In relation to the detention review mechanisms referred to in the Government response, the source notes that those mechanisms operate within the legal framework that permits arbitrary detention. They also operate within a set of referral guidelines.

60. In conclusion, the source disagrees with the assessment of the Government in relation to access to health care in Australian detention centres and it refers to a report of the Public Interest Advocacy Centre.[1] The source adds that the Islamic Republic of Iran is not a safe country for Mr. Cheraghi to return to and the country does not accept involuntary returnees from Australia.

Discussion

61. The Working Group thanks the source and the Government for their submissions. The Working Group appreciates the cooperation and engagement of both parties in the present matter.

62. The source has submitted that the detention of Mr. Cheraghi is arbitrary and falls within categories II, IV and V. While not addressing those categories specifically, the Government of Australia rejects the submissions. The Working Group will examine them in turn.

63. The source has submitted that Mr. Cheraghi has been deprived of liberty as a result of the exercise of his rights guaranteed by article 14 of the Universal Declaration of Human Rights. It is submitted that since being charged with an offence and arrested, Mr. Cheraghi's visa was cancelled on 11 September 2015 and that he has been in administrative detention ever since. The source emphasizes that Mr. Cheraghi has not been convicted of a crime and that he has been held in administrative detention for almost three years while waiting for the criminal justice process.

64. The Government has argued that anyone who arrives in Australia without a visa or whose visa is cancelled must be detained until that person is removed from Australia or a visa is issued. In relation to Mr. Cheraghi, the Government has submitted that he arrived at

[1] Public Interest Advocacy Centre, "In poor health: health care in Australian immigration detention" (2018).

Christmas Island, Australia, on 16 December 2012 and since he was not in the possession of a valid visa, he was detained under section 189 (3) of the Migration Act. On 22 May 2013, he was granted a temporary visa for seven days with further visas granted subsequently. However, on 26 August 2015, he was arrested and charged with a criminal offence and his visa was cancelled on 11 September 2015. Since 30 October 2015, Mr. Cheraghi has been held in administrative detention in accordance with section 189 (1) of the Migration Act.

65. The Working Group notes that Mr. Cheraghi was detained upon his arrival at Christmas Island on 16 December 2012 by the Australian authorities, who held him in detention until 22 May 2013, when he was granted a visa and released on the same day. Some two years later, on 26 August 2015, he was arrested and charged with a criminal offence. On 11 September 2015, his visa was cancelled and he has been in administrative detention since 30 October 2015.

66. The Working Group notes that the source has not argued that the arrest of Mr. Cheraghi on 26 August 2015 may have been arbitrary. Rather, the source has argued that the cancellation of his visa, which allegedly occurred on the basis of an adverse character assessment due to his arrest, has resulted in Mr. Cheraghi being administratively detained since 30 October 2015. The Government has not disputed the cancellation of the visa and subsequent administrative detention of Mr. Cheraghi, noting that this has been carried out strictly in accordance with the Migration Act. The Government has, however, failed to provide any reasons for the cancellation of Mr. Cheraghi's visa. The Working Group must therefore accept that this has occurred on the basis of an adverse character assessment of Mr. Cheraghi owing to him being charged with a criminal offence.

67. The Working Group acknowledges that the detention of Mr. Cheraghi on 30 October 2015 appears to have been carried out in accordance with the provisions of the Migration Act. However, as the Working Group has repeatedly stated in its jurisprudence, even when the detention of a person is carried out in conformity with national legislation, the Working Group must ensure that the detention is also consistent with the relevant provisions of international law.[7]

68. The Working Group wishes to reiterate that seeking asylum is not a criminal act; on the contrary, seeking asylum is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights, and in the 1951 Convention relating to the Status of Refugees, and its 1967 Protocol.[8] The Working Group notes that those instruments constitute international legal obligations undertaken by Australia.

69. In relation to Mr. Cheraghi, the Working Group observes that it is not disputed that he has been in detention since 30 October 2015, a period of nearly three years. The Working Group also observes that this is not detention exercised in pursuance of the charges that have been brought against Mr. Cheraghi following his arrest on 26 August 2015, but rather administrative detention according to the provisions of the Migration Act.

70. The Working Group refers to its revised deliberation No. 5 on deprivation of liberty of migrants, whereby: "Any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt."

71. In the present case, the Government has not provided any explanation for the continued detention of Mr. Cheraghi since 30 October 2015, aside from the fact that his visa was cancelled on 11 September 2015. It is clear to the Working Group that his administrative detention was not in pursuance of such legitimate aims as documenting an entry or verification of identity. The Working Group also observes that Mr. Cheraghi has not been convicted of any criminal offence and the Government has failed to provide any other legitimate explanation for his continued detention for nearly three years.

[7] See, for example, opinions No. 46/2011, No. 42/2012, No. 79/2017, No. 1/2018 and No. 20/2018.

[8] See opinions No. 28/2017 and No. 42/2017 and revised deliberation No. 5 on deprivation of liberty of migrants, para. 9.

72. In addition, the Working Group recalls that any detention in the context of migration must be for the shortest period of time.[4] In that respect, the Working Group observes that the Government has failed to explain how that requirement was met in the case of Mr. Cheraghi, who has been in detention for nearly three years.

73. The Working Group therefore concludes that the detention of Mr. Cheraghi was based purely on his earlier exercise of the legitimate right to seek asylum and is therefore arbitrary, falling within category II.

74. The source has further submitted that the detention of Mr. Cheraghi is arbitrary within category IV since he is an asylum seeker who has been subjected to prolonged administrative custody and has not been guaranteed the possibility of administrative or judicial review or remedy. The Government of Australia denies such allegations, arguing that a person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court of Australia through such actions as habeas corpus.

75. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society. That right, which in fact constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty and to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities and migration detention.[5] It also applies irrespective of the place of detention or the legal terminology used in the legislation, and any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[6]

76. The Working Group observes that the facts of Mr. Cheraghi's case since his detention on 30 October 2015, as presented to it by both the source and the Government, are characterized by various submissions by him to the courts, pursuing different visa applications and challenging their rejection. However, none of those appearances have concerned his need to remain in detention since the cancellation of his visa. Furthermore, no judicial body has ever been involved in the assessment of the legality of Mr. Cheraghi's detention, noting that such consideration by a judicial body would necessarily involve the assessment of the legitimacy, need and proportionality of such detention.[7]

77. In other words, throughout his nearly three years of detention, Mr. Cheraghi has been unable to challenge the legality of his detention per se. The only body that appears to have been reviewing the need for Mr. Cheraghi to remain in detention is the Case Management and Detention Review Committee. However, as the Working Group has already observed in another case, that is not a judicial body.[8] Furthermore, the Working Group observes the repeated failure on behalf of the Government of Australia to explain how the reviews carried out by the Committee have satisfied the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 of the Covenant.[9]

78. The Working Group also recalls the numerous findings by the Human Rights Committee where the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 (1) of the Covenant.[10] Furthermore, as the Working Group notes in its revised deliberation No. 5,

[4] See revised deliberation No. 5, paras. 12 and 25.

[5] See Basic Principles and Guidelines, para. 11 and guideline 1, para. 47 (a).

[6] Ibid., para. 47 (b).

[7] See revised deliberation No. 5, paras. 12 and 13.

[8] See opinion No. 20/2018, para. 61.

[9] Ibid.

[10] See *C. v. Australia*, *Baban et al. v. Australia* (CCPR/C/78/D/1014/2001), *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002), *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002),

detention in the migration setting must be exceptional and in order to ensure this, alternatives to detention must be sought.[11] In the case of Mr. Cheraghi, it is clear to the Working Group that there was never any consideration of alternatives to detention, which is a further breach of article 9 of the Covenant.

79. The Working Group thus concludes that Mr. Cheraghi has been denied the right to challenge the continued legality of his detention in breach of article 9 of the Covenant and that his detention is therefore arbitrary, falling within category IV.

80. Furthermore, the source submits that the detention of Mr. Cheraghi falls within category V, as Australian citizens and non-citizens are not equal before the courts and tribunals of Australia owing to the effective result of the decision of the High Court in the case of *Al-Kateb v. Godwin*. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. The Government denies such allegations, arguing that in the case cited the High Court held that the provisions of the Migration Act requiring detention of non-citizens until they are removed, deported or granted a visa, even if removal is not reasonably practicable in the foreseeable future, were valid.

81. The Working Group remains puzzled by this explanation from the Government,[12] as it only confirms that the High Court affirmed the legality of the detention of non-citizens until they are removed, deported or granted a visa, even if removal is not reasonably practicable in the foreseeable future. In other words, the Government has actually failed to explain how such non-citizens can challenge their continued detention after that decision.

82. The Working Group also remains surprised by the Government's submission that actions such as habeas corpus are a possible avenue of redress for Mr. Cheraghi.[13] It is clear to the Working Group that current Australian legislation does permit the detention of Mr. Cheraghi and therefore the habeas corpus challenge, which is aimed at challenging illegal detention, does not provide a realistic avenue of redress for people in his situation. However, the Working Group once again recalls that merely because a detention is carried out in conformity with national law, it does not mean that the detention is not arbitrary under international law. All States must ensure that their domestic legislation duly and fully reflects the obligations stemming from international law.

83. The Working Group notes the numerous findings by the Human Rights Committee, as referred to in paragraph 78 above, and also notes that the effect of the decision of the High Court of Australia in the above-mentioned case is such that non-citizens have no effective remedy against their continued administrative detention.

84. In that respect, the Working Group specifically notes the jurisprudence of the Human Rights Committee in which it examined the implications of the High Court judgment in the case of *Al-Kateb v. Godwin* and concluded that the effect of that judgment was such that there was no effective remedy to challenge the legality of continued administrative detention.[14]

85. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter and this remains the position of the Working Group in the present case.[15] The Working Group underlines that this situation is discriminatory and contrary to articles 16 and 26 of the Covenant. It therefore concludes that the detention of Mr. Cheraghi is arbitrary, falling within category V.

Shams et al. v. Australia (CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270 and 1288/2004); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

[11] See A/HRC/13/30, para. 59. See also E/CN.4/1999/63/Add.3, para. 33; A/HRC/19/57/Add.3, para. 90 (e); A/HRC/27/48/Add.2, para. 124; and A/HRC/30/36/Add.1, para. 81. See also opinions No. 72/2017 and No. 21/2018.

[12] See opinion No. 21/2018, para. 79.

[13] See opinion No. 20/2018, para. 64.

[14] See *F.J. et al. v. Australia*, para. 9.3.

[15] See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018 and No. 21/2018.

86. The Working Group observes that the present case is only the latest in a number of cases from Australia that have come before the Working Group during the past two years which have all concerned the same issue, namely the mandatory immigration detention in Australia under the Migration Act.[16] The Migration Act stipulates that an unlawful non-citizen must be detained and kept in immigration detention until they are removed from Australia or granted a visa. In addition, section 196 (3) of the Act provides that "To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1) (a), (aa) or (b)) unless the non-citizen has been granted a visa." As such, providing there is some sort of process relating to the grant of a visa or removal (even if removal is not reasonably practicable in the foreseeable future), the detention of an unlawful non-citizen is permitted under Australian law.

87. The Working Group wishes to emphasize that deprivation of liberty in the immigration context must be a measure of last resort and alternatives to detention must be sought in order to meet the requirement of proportionality.[17] Furthermore, as the Human Rights Committee has argued in its general comment No. 35 (2014) on liberty and security of person: "Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of a particular reason specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security."

88. The provisions of the Migration Act are at odds with those requirements of international law, as sections 189 (1) and 189 (3) of the Act provide for de facto mandatory detention of all unlawful non-citizens, unless they are being removed from the country or granted a visa. Furthermore, the Working Group observes that the Act does not reflect the principle of exceptionality of detention in the context of migration as recognized in international law, nor does it provide for alternatives to detention to meet the requirement of proportionality.[18]

89. The Working Group is seriously concerned at the increasing number of cases emanating from Australia that are being brought to its attention concerning the implementation of the Migration Act and it urges the Government of Australia to review this legislation in the light of its obligations under international law without delay, while paying due attention to the opinions of the Working Group.[19]

90. On 7 August 2017, the Working Group sent a request to the Government of Australia to undertake a country visit. The Working Group notes the encouraging response received on 24 November 2017 in which the Government indicates that it would be in a position to invite the Working Group to conduct a visit in the first quarter of 2019.

91. The Working Group reiterates that it would welcome the opportunity to conduct a visit to Australia and its offshore detention facilities in order to engage with the Government in a constructive manner and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty. The Working Group looks forward to discussing concrete dates for such a visit to be carried out in 2019.

Disposition

92. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Edris Cheraghi, being in contravention of articles 2, 3, 7, 8, 9 of the Universal Declaration of Human Rights and of articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, IV and V.

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[16] Ibid.

[17] See A/HRC/10/21, para. 67. See also revised deliberation No. 5, paras. 12 and 16.

[18] Ibid.

[19] See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018 and No. 21/2018.

93. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Cheraghi without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

94. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Cheraghi immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

95. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Cheraghi and to take appropriate measures against those responsible for the violation of his rights.

96. In order to ensure the non-repetition of the violations presented in its opinions, the Working Group requests the Government to urgently review the Migration Act 1958 in the light of its obligations under international law.[20]

97. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

98. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Cheraghi has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Cheraghi;

(c) Whether an investigation has been conducted into the violation of Mr. Cheraghi's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Australia with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

99. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

100. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

101. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[21]

[*Adopted on 22 August 2018*]

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[20] Ibid.

[21] See Human Rights Council resolution 33/30, paras. 3 and 7.